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15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA,

18 Plaintiff,

19 vs.

20 STEVEN CARROLL DEMOCKER,

21 Defendant.

) No. P1300CR20081339

) Div. 6

) **MOTION TO PRECLUDE THE**
) **STATE'S COMPUTER**
) **FORENSIC EXPERTS AND**
) **REPORTS REGARDING**
) **INTERNET SEARCHES**

) **(Oral Argument Requested)**

22 **MOTION**

23 Steven DeMocker, by and through counsel, hereby respectfully requests that the
24 Court preclude the State from offering evidence or testimony related to web searches
25 and web search results from Mr. DeMocker's computer. The State delayed examination
26 of the computer forensics in this case, late disclosed examination reports to the defense
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1 in March and April of 2010, and withheld critical EnCase files from the defense. More
2 importantly, the State just revealed, contrary to its earlier assertions in testimony and
3 written reports, that it cannot determine the date that the internet searches at issue were
4 performed, cannot determine when many of the search pages were viewed, cannot
5 determine how long any search page was viewed and cannot determine if any search
6 result was viewed on the computer. This motion is based on the due process clause, the
7 Confrontation Clause, the Eighth Amendment and Arizona counterparts, Arizona Rules
8 of Evidence, Arizona Rules of Criminal Procedure and the following Memorandum of
9 Points and Authorities.
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12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 The State has generated over 20 reports of its computer forensic examinations of
14 the six hard drives that were seized in this case. Several of these reports and their
15 attachments have been precluded by the Court as they contained over 80,000 pages of
16 emails and were disclosed to the defense until March of 2010, within mere months of a
17 death penalty trial that has been scheduled since May of 2009. These hard drives were
18 all seized by the State in July of 2008, with the exception of Mr. Knapp's hard drive,
19 which was seized in January 2009. During testimony on February 19, 2010, the State
20 also disclosed that it waited over four months after seizing the hard drives to even begin
21 its forensic examination. During this same testimony, the State also revealed that
22 although James Knapp's computer was seized in January of 2009, DPS did not begin
23 examination of this computer until ten months later, in October, 2009.
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1 **1. The State's Withholding of the EnCase Case Files From the Defense.**

2 The State used a variety of software programs to extract data from the harddrives
3 at issue. One of the primary programs it used was EnCase. The defense has been
4 requesting the EnCase case files from the State for months and to date (one day before
5 the start of trial) the defense has still not received them. On February 19, 2010 the head
6 of the DPS computer forensics lab testified that he was not familiar with EnCase case
7 files. On February 25, counsel filed a motion with this Court seeking to compel
8 disclosure of these files. The motion attached the EnCase manual which explains the
9 critical nature of the EnCase case file to any computer forensic examination. The State
10 did not deny that it had these files and that it had not disclosed them to the defense.
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12 On April 20, 2010, exactly two weeks until the start of trial, the State disclosed
13 yet another computer forensic report, purporting to be a summary of findings related to
14 Mr. DeMocker's computer. This report provides information about six "relevant
15 Internet search terms." Counsel did not receive the CD with this information until April
16 26, 2010. On April 27, 2010, counsel interviewed Detective Steve Page, the author and
17 examiner of all reports detailing internet searches from Mr. DeMocker's computer.
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19 During his defense interview, Detective Page acknowledged that he is familiar
20 with the EnCase case files in this case and that the files track the examination being
21 done. He also identified several items of interest which are in the EnCase case files and
22 that have not been provided to the defense. Detective Page agreed that the EnCase case
23 file is basically the repository for all of the forensic analysis performed on the specific
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1 examination. The information contained on the case file is not contained anywhere else
2 and has not been disclosed to the defense in any format. Detective Page indicated that it
3 would take only a day to copy this information and provide it to the defense. He also
4 explained that there were now several case files and they are quite large. The
5 information that is contained only on the En Case case files includes information about
6 how keyword searches were performed, the results of keyword searches, and all other
7 forensic examination performed by the State.¹

10 2. The State's Lack of Information About Internet Searches.

11 Detective Page also revealed in his interview that he cannot determine the dates
12 when four of the six internet search terms identified by the State were even searched on
13 the computer.² He also admitted that he cannot determine if anyone actually accessed
14 any of the search results from any of the searches, nor can he determine how much time
15 was spent on any search results page on whatever date it was actually searched or
16 viewed. With respect to two searches, Detective Page cannot determine any date on
17 which these pages were even viewed on the computer.³ With respect to two of these
18 searches⁴ Detective Page is able to determine that a page was last viewed on a particular
19 date. But Detective Page does not know when the search was performed, what caused
20 the page to appear on the computer, how long the search results were viewed or whether
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24 ¹ Detective Page also notified counsel for the first time on April 27, 2010 that he performed earlier analysis of the
25 hard drives in this case on a portable DPS computer using EnCase but that these EnCase files have since been
destroyed.

26 ² These searches are "how to kill and make it look like a suicide;" "how to stage a suicide;" "how to kill
someone;" and "payment of life insurance benefits in the case of homicide."

27 ³ These searches are "how to kill someone;" and "payment of life insurance benefits in the case of homicide."

28 ⁴ These searches are "how to kill and make it look like a suicide" and "how to stage a suicide;"

1 anyone actually viewed any link that resulted from the search. With respect to two
2 searches, Detective Page testified both that he can and cannot determine what date the
3 search was performed. He finally concluded that he could determine the date on which
4 the search was performed by referencing date and time information he had not included
5 in his April 15, 2010 summary report. With respect to these two searches, Detective
6 Page admitted that he does not know how long the page was viewed or if any of the
7 search results were actually accessed by Mr. DeMocker.⁵ Detective Page's interview
8 was terminated prior to its completion. Counsel requested additional dates and times to
9 complete the interview but has had no response from the State.
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12 The April 15 report from Detective Page also contains attached fragments of web
13 pages that were recovered from the computer and are purported to constitute search
14 results for some of the six searches. These pages contain search results related to
15 teenagers killing their parents, death by an iPod, beheadings, pushing someone over a
16 balcony, hangings, suicide bombings in foreign countries and other matters completely
17 unrelated to the facts alleged in this case. Some of the search results are joke pages
18 about giving someone cigarettes as a way to kill them and make it look like an accident.
19 Detective Page acknowledged that the search results for these pages have nothing to do
20 with how Carol Kennedy was killed. And, Detective Page cannot determine when these
21 searches were performed, when these pages were viewed, how long these pages were
22 viewed, or if any of the results were accessed.
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26 ⁵ These searches include "how to make homicide appear suicide" and "tips from a hitman on how to kill
27 someone."
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1 **3. Prejudice from State's Late Disclosures and Refusal to Disclose.**

2 The State's delay in examining these items and refusal to turn over the EnCase
3 case file have guaranteed that the defense is unable to competently examine the State's
4 computer forensics in this case. Mr. DeMocker has a right to independently examine
5 the State's analysis and conclusions. Detective Page acknowledged at his interview that
6 the EnCase case files contain information that is not otherwise available to the defense
7 and that is critical to this case. The defense has been making this argument to this Court
8 for months. Based on the State's conduct, Mr. DeMocker is entirely unable to exercise
9 his rights to test the State's evidence. This is an interference with his right to confront
10 the evidence against him. *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

11 The Confrontation Clause applies not only in-court but also out-of court because
12 integral to the right to confront is the right to prepare for that confrontation:

13 [W]hile a restriction on pretrial discovery might not suggest as direct a violation
14 on the confrontation right as would a restriction on the scope of cross-
15 examination at trial, the former [is] not free from confrontation concerns.

16 *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985). Moreover, the,
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18 “right of cross-examination also may be significantly infringed by events
19 occurring outside the trial itself, such as the wholesale denial of access to
20 material that would serve as the basis for a significant line of inquiry at trial.”

21 *Pennsylvania v. Ritchie*, 480 U.S. 39, 66, 107 S.Ct. 989, 1006 n.2 (1987) (plurality)
22 (Stevens, J. dissenting).
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24 As *Crawford* reiterated, limiting a defendant's access to pretrial preparation
25 violates the Confrontation Clause:
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1 [R]estriction on the ability to engage in cross-examination does not suggest,
2 however, that the Confrontation Clause prohibits only such limitations. A crucial
3 avenue of cross-examination also may be foreclosed by the denial of access to
4 material that would serve as the basis for this examination.

5 *Id.* 480 U.S. at 67, 107 S.Ct. at 1006.

6 The State's refusal to disclose critical EnCase case files that have been in their
7 possession for over a year and its delay in examining these hard drives has also
8 interfered with the Defense's ability to prepare a defense, conduct an independent
9 examination and subject the State's evidence to examination and analysis.

10 **4. Given the Limited Information About These Searches, the Prejudicial**
11 **Effect is Far Outweighed by Any Limited Probative Value and they**
12 **Should Be Excluded Under Arizona Rule of Evidence 403.**

13 Given the lack of any information about when any particular search was performed,
14 whether any search result was selected, how long the page was viewed and any other
15 information about the searches, these six internet searches are of incredibly limited
16 probative value. The most the State can claim with respect to two of these searches is
17 that it was viewed on a particular date. With respect to two other searches, the State
18 cannot even state that much. There are only two searches that the State now says, for
19 the first time on April 27, 2010 in a defense interview, that it can determine the date and
20 time of the search. This is allegedly based on information that was not contained in the
21 State's reports as late as April 15, 2010.

22 These searches and the results also do not relate in any way to what is alleged to
23 have happened to Carol Kennedy. It is clear that Ms. Kennedy's homicide was not
24 staged to look like a suicide. As Detective Page acknowledged at his interview, he is

1 not familiar with any suicide by blunt force trauma to the head. It is also clear that the
2 other search results all relate to issues wholly unconnected from the way Ms. Kennedy
3 died. These search results are either joke pages about giving someone cigarettes, or are
4 so far removed from what is alleged to have occurred in this case as to be meaningless.
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6 Arizona Rule of Evidence 403 provides that relevant evidence may be excluded if its
7 probative value is substantially outweighed by the danger of unfair prejudice, confusion
8 of the issues, or misleading the jury, or by consideration of undue delay, waste of time,
9 or needless presentation of cumulative evidence. The State proposes to offer evidence
10 of undated computer searches about matters that are not related to the manner in which
11 Ms. Kennedy was killed. Because the State cannot determine when these searches were
12 performed, how long the web page containing search results were viewed, if any search
13 result was selected, and for some searches, when the page was even viewed at all, this
14 information should be excluded. None of these searches remotely relates to the way
15 Ms. Kennedy was killed. On the other hand, the prejudicial effect and potential to
16 mislead and confuse the jury cannot be overstated. These searches relate to suicide and
17 how to kill someone. Ms. Kennedy's murder was not made to look like suicide and she
18 was not killed in a manner suggested in any of the search results, as acknowledged by
19 Detective Page. Trial courts have broad discretion in balancing probative value against
20 prejudice, and will not be reversed unless error is clear. *State v. Taylor*, 169 Ariz. 121,
21 126, 817 P.2d 488, 493 (1991). Given the limited probative value of these internet
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searches and the prejudicial effect and potential to mislead and confuse, this Court should exclude evidence of these searches under Rule 403.

The United States Constitution requires that "extraordinary measures [be taken] to insure that the [Accused] is afforded process that will guarantee, as much as is humanly possible, that [a sentence of death not be] imposed out of whim, passion, prejudice, or mistake." *Caldwell v. Mississippi*, 472 U.S. 320, 352 n.2 (1985) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring)). Indeed, "[t]ime and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." *Caspari v. Bolden*, 510 U.S. 383, 393 (1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J., concurring in part and dissenting in part)). See also *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (noting that the Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.") (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). This elevated level of due process applies both to the guilt and penalty phases of the case. *Beck v. Alabama*, 447 U.S. 625, 638 (1980).

CONCLUSION

Defendant Steven DeMocker, by and through counsel, hereby requests that this Court prohibit the State from offering testimony from any of the State's computer forensic experts regarding internet searches from Mr. DeMocker's computer.

DATED this 3RD day of May, 2010.

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filing this 3rd day of May, 2010, with:

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COPIES of the foregoing hand delivered this
this 3rd day of May, 2010, to:

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